

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF JOEL E. HAGEN,)	Case No. 2619-2005
)	
Claimant,)	
)	
vs.)	
)	
CAROLE DICKSON, d/b/a CANTINA LA COCINA AND CASINO,)	
)	
Respondent.)	

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND ORDER**

* * * * *

I. INTRODUCTION

In this matter, Respondent Carol Dickson, d/b/a Cantina La Cocina and Casino, appeals from a determination of the Wage and Hour Unit of the Department of Labor and Industry that found she owed additional overtime wages to Claimant Joel Hagen. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on February 23, 2006. Hagen represented himself and testified under oath. Dickson represented herself and testified under oath. In addition, Debbie McLane, a Cantina La Cocina and Casino employee, testified under oath on behalf of the respondent. The parties stipulated to the admission of Wage and Hour Unit documents 1 through 140. Based on the evidence and argument presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Is Hagen due additional overtime wages and penalty as provided by law?

III. FINDINGS OF FACT

1. Dickson employed Hagen as a bartender at Cantina La Cocina and Casino beginning in 2002. Between June 28, 2003 and September 30, 2003, Dickson paid Hagen at rate of \$8.00 per hour. Beginning September 30, 2003, and continuing

until the time Hagen left his employment on June 5, 2005, Dickson paid Hagen at a rate of \$8.75 per hour.

2. Hagen worked Tuesday through Saturday. Friday and Saturday were busy nights. On busy nights, the bar and casino could stay open until 2:00 a.m. If the bar was not busy on a given night, Hagen had the discretion to decide whether or not to close the bar before 2:00 a.m.

3. Sometime prior to March 30, 2002, Hagen and Dickson entered into an agreement that Hagen could work extra hours (in excess of 40 hours each week), but that he would only be paid at his regular hourly rate for those extra hours. Hagen thereafter proceeded to work extra hours, frequently exceeding 40 hours of work each week.

4. Between June 28, 2003 and July 31, 2003, Dickson paid Hagen \$8.00 per hour. His hourly overtime rate at this hourly wage was \$12.00 ($\$8.00 \times 1.5 = \12.00). Beginning on August 1, 2003, and continuing until Hagen's resignation on June 5, 2005, Dickson paid Hagen \$8.75 per hour.¹ His hourly overtime wage at this hourly wage time was \$13.13 ($\$8.75 \times 1.5 = \13.13).

5. On June 28, 2005, Hagen filed his wage claim alleging additional overtime wages were due to him.

6. Beginning June 28, 2003 through the work week ending December 27, 2003, Hagen worked the regular and overtime hours and was paid the amounts shown on Appendix I which is attached to this decision.

7. For the work weeks ending January 3, 2004 through December 25, 2004, Hagen worked the regular and overtime hours and was paid the amounts shown on Appendix 2 which is attached to this decision.

¹ Hagen stated during the hearing that he thought his change in hourly rate from \$8.00 per hour to \$8.75 per hour occurred in September, 2003. The check stubs that Hagen received from his employer clearly show that his hourly wage increase to \$8.75 per hour began on August 5, 2003 during the August 1 to August 15, 2003 pay period. *See, e.g.*, Document 125, Hagen's 8/1/03 through 8/15/2003 pay check which shows his hourly wage rate at \$8.75.

8. For the work weeks ending between January 1, 2005 through June 11, 2005, Hagen worked the regular and overtime hours and was paid the amounts shown on Appendix 3 which is attached to this decision.

9. Adding the regular and overtime hours as shown in Appendices 1, 2, and 3, at the rates discussed in Paragraph 4 above, Hagen was due a total of \$34,430.34 in total regular wages and \$6,134.78 in overtime wages for a total amount due of \$40,565.12 ($\$34,430.34 + \$6,134.78 = \$40,565.12$). During these time periods, he was only paid \$37,372.99. He was thus underpaid \$3,192.13 in overtime wages ($\$40,565.12 - \$37,372.99 = \$3,192.13$).

10. 110% penalty on the amount of overtime wages due is equal to \$3,511.34 ($\$3,192.13 \times 1.10 = \$3,511.34$).

IV. DISCUSSION²

A. *Hagen Can Only Recover Wages Dues After June 28, 2003.*

In his complaint, Hagen seeks overtime wages due to him between February, 2003 and the date he terminated his employment in June, 2005. He did not file his complaint until June 28, 2005.

Mont. Code Ann § 39-3-207 provides:

(1) An employee may recover all wages and penalties provided for the violation of 39-3-206 by filing a complaint within 180 days of default or delay in the payment of wages.

(2) Except as provided in subsection (3), an employee may recover wages and penalties for a period of 2 years prior to the date on which the claim is filed if the employee is still employed by the employer or for a period of 2 years prior to the date of the employee's last date of employment.

Hagen did not file his wage claim until June 28, 2005. Under the above statute, he may not recover wages due to him prior to June 28, 2003. Accordingly,

²Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

his complaint can only be considered to the extent it seeks wages due to him after June 28, 2003.

B. *Dickson owes Hagen Overtime Wages.*

Montana law requires employers to pay wages when due, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Montana law also requires employers to pay an overtime premium of 1½ times the regular hourly rate when employees work more than 40 hours in a work week. Mont. Code Ann. §39-3-405.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to “show the extent and amount of work as a matter of just and reasonable inference.” *Id.* at 189, 562 P.2d at 476-77, *citing* *Anderson*, 328 U.S. at 687, *and Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *see also*, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff’s wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, “the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.’ * * *.” *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, *quoting Purcell v. Keegan*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

The problem that lead to the underpayment of the overtime wages in this case was the parties’ agreement that Hagen could work overtime hours but that he would only be paid at his regular hourly wage for each of those additional hours. Mont. Code Ann. 39-3-405 prohibits employers from employing their employees more than 40 hours each week unless they are paid at a rate of 1½ times the hourly rate for the overtime hours the employees work. Hagen and Dickson’s agreement to only pay Hagen at his regular hourly rate for his overtime hours was thus illegal and

unenforceable. *State ex rel. Neiss v. District Court*, (1973), 162 Mont. 324, 511 P.2d 979.

At the hearing in this matter, Dickson stated that she did not dispute the hours that Hagen claimed to have worked. Rather, her contention is that Hagen kept the bar open longer than he needed to in order to add to his overtime. Hagen clearly had the authority to close the bar when he saw fit and Dickson, therefore, cannot complain on this basis. And even if Hagen did not have such authority, Dickson did nothing to stop him from working the overtime hours. Admin. R. Mont. 24.16.1005 ARM specifically provides that “work not requested but suffered or permitted is work time.” Dickson thus owes the overtime even if she did not authorize Hagen to keep the bar open until he was ready to close. Hagen has demonstrated that he is owed an additional \$3,192.13 in unpaid overtime wages.

C. Dickson Owes Penalty.

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. §39-3-206. For cases involving overtime claims, a penalty of 110% is required under the circumstances presented in this case. Admin. R. Mont. 24.16.7561. Applying this regulation as he is required to do, the hearing examiner has no choice but to find that the respondent owes penalty in the amount of \$3,511.34.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Dickson owes Hagen additional \$3,192.13 in unpaid overtime wages

3. Dickson owes Hagen 110% penalty in the amount of \$3,511.34.

VI. ORDER

Carole Dickson, d/b/a Cantina La Cocina and Casino is hereby ORDERED to tender a cashier’s check or money order in the amount of \$6,703.47, representing \$3,192.13 in unpaid overtime wages, and \$3,511.34 in penalty on the unpaid overtime wages, payable to Joel E. Hagen, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after

service of this decision. Dickson may withhold appropriate deductions for income taxes and social security on the wage portion, but not the penalty portion.

DATED this 4th day of April, 2006.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

Hagen FOF ghp

APPENDIX 1

June 28, 2003 through week ending December 27, 2003

Week	Sun.	Mon.	Tues.	Weds.	Thurs.	Fri.	Sat.	Reg. Hours	OT Hours	Reg. Wages Due	OT Wages Due	Wages Paid
6/28							9.50	9.50	0	76.00	0	
7/05	0	0	7.00	7.75	11.00	6.00	9.00	40	.75	320.00	9.00	654.00
7/12	0	0	8.00	9.75	8.00	8.50	9.00	40	3.25	320.00	39.00	
7/19	0	0	6.00	8.50	8.00	6.00	7.25	35.75	0	286.00	0	720.00
7/26	0	0	9.25	7.00	6.25	11.00	6.00	39.50	0	316.00	0	
8/02	0	0	11.00	7.45	9.00	10.00	10.75	40	8.20	320.00	98.40	773.60
8/09	0	0	11.00	10.50	11.00	8.00	9.00	40	9.50	350.00	124.69	
8/16	0	0	10.00	8.00	10.00	8.25	9.00	40	5.25	350.00	68.91	931.88
8/23	0	0	10.25	11.00	10.50	5.50	9.00	40	6.25	350.00	82.03	
8/30	0	0	11.00	9.00	8.50	7.50	0	36	0	315.00	0	
9/06	0	6.50	9.50	0	11.00	6.00	10.00	40	3.00	350.00	39.38	798.44
9/13	0	0	10.00	10.00	11.00	7.00	9.00	40	7.00	350.00	91.88	
9/20	0	0	VAC	VAC	VAC	VAC	VAC	30	0	262.50	0	787.50
9/27	0	0	11.00	11.00	4.75	6.00	6.25	39	0	341.25	0	
10/04	0	0	11.00	8.00	8.50	6.50	6.50	40	.5	350.00	6.56	437.50
10/11	0	0	7.75	6.00	8.00	7.00	9.75	38.50	0	336.88	0	
10/18	10	0	9.00	9.00	9.00	6.00	8.00	40	11.00	350.00	144.38	1102.5
10/25	0	0	8.50	10.00	8.50	6.00	6.50	39.50	0	345.63	0	
11/01	0	7.75	9.00	7.00	8.00	6.00	0	37.75	0	330.61	0	877.19
11/08	0	0	8.75	9.00	8.00	10.00	8.50	40	4.25	350.00	55.78	
11/15	9.00	1.00	0	0	10.00	11.00	9.00	40	0	350.00	0	
11/22	0	0	11.00	8.50	9.00	6.00	9.00	40	3.5	350.00	45.94	737.19
11/29	0	0	9.50	11.00	0	4.50	11.25	36.25	0	317.19	0	
12/06	0	0	10.00	8.00	11.00	6.00	6.00	40	1.00	350.00	13.13	697.81
12/13	0	0	10.75	10.50	9.75	8.00	4.50	40	3.50	350.00	45.94	
12/20	0	0	11.00	9.00	10.50	8.00	8.75	40	7.25	350.00	95.16	739.38
12/27	0	0	10.50	0	0	11.00	9.00	30.50	0	266.88	0	

APPENDIX 2

Weeks ending December 30, 2003 through December 25, 2004

Week	Sun.	Mon.	Tues.	Weds.	Thurs.	Fri.	Sat.	Reg. Hours	OT Hours	Reg. Wages Due	OT Wages Due	Wages Paid
1/03	0	0	11.00	4.50	0	9.00	9.00	33.50	0	293.13	0	815.94
1/10	0	0	11.00	8.00	11.00	8.00	9.50	40.00	7.50	350.00	98.44	
1/17	0	0	10.50	8.50	9.00	8.25	11.00	40.00	7.25	350.00	95.16	
1/24	0	0	11.00	6.25	10.00	7.75	0	35.00	0	306.25	0	
1/31	0	0	11.00	11.00	4.25	10.00	11.25	40.00	7.5	350.00	98.44	890.31
2/07	0	0	10.00	9.00	11.00	8.50	8.25	40.00	6.75	350.00	88.59	
2/14	0	0	9.50	11.00	9.25	6.00	9.00	40.00	4.75	350.00	62.34	
2/21	0	0	10.25	9.75	11.00	8.00	11.00	40.00	10.00	350.00	131.25	800.63
2/28	0	0	8.75	11.25	11.00	8.00	8.00	40.00	7.00	350.00	91.88	
3/06	0	0	10.00	9.50	9.00	7.75	11.00	40.00	7.25	350.00	95.16	848.75
3/13	0	0	10.00	9.75	11.00	7.00	0	37.75	0	330.31	0	
3/20	0	0	0	0	11.00	6.75	8.00	25.75	0	225.31	0	796.25
3/27	0	0	11.00	10.00	10.00	6.50	0	37.50	0	328.13	0	
4/03	7.00	0	10.00	11.00	9.50	8.00	11.00	40.00	16.50	350.00	216.56	798.44
4/10	0	0	10.00	9.00	8.00	7.00	6.00	40.00	0	350.00	0	
4/17	0	0	11.00	11.00	11.00	8.00	7.00	40.00	8.00	350.00	105.00	888.13
4/24	0	0	11.00	11.00	9.00	6.00	5.50	40.00	2.50	350.00	32.81	
5/01	0	0	11.00	8.00	11.00	6.00	8.00	40.00	4.00	350.00	52.50	818.13
5/08	0	0	0	8.50	10.75	6.50	6.75	32.50	0	284.38	0	
5/15	8.50	0	11.00	11.00	11.00	8.00	0	40.00	9.50	350.00	124.69	
5/22	0	0	11.00	10.50	9.00	8.00	5.50	40.00	4	350.00	52.50	787.50
5/29	0	0	11.00	11.00	11.00	6.50	5.75	40.00	5.25	350.00	68.91	
6/05	0	0	11.00	9.50	9.00	8.00	5.00	40.00	2.50	350.00	32.81	780.94
6/12	0	0	10.50	11.00	10.50	8.00	6.00	40.00	6.00	350.00	78.75	
6/19	0	0	8.50	10.25	11.00	8.00	5.25	40.00	3.00	350.00	39.38	848.75
6/26	0	0	10.50	11.00	8.50	8.25	0	38.25	0	334.69	0	
7/03	0	0	10.50	9.00	12.50	8.00	5.00	40.00	5.00	350.00	65.63	807.19
7/10	0	0	10.50	11.00	8.00	8.00	5.00	40.00	2.50	350.00	32.81	
7/17	0	0	10.50	11.00	10.50	11.00	5.50	40.00	8.50	350.00	111.56	875.00

7/24	0	0	10.50	10.50	10.00	5.00	0	36.00	0	315.00	0	
7/31	9.00	0	10.00	11.00	8.50	8.00	5.00	40.00	11.50	350.00	150.94	910.00
8/07	0	0	10.00	11.00	9.50	7.50	5.00	40.00	3.00	350.00	39.38	
8/14	0	0	10.50	10.00	9.50	6.00	5.00	40.00	1.00	350.00	13.13	
8/21	0	0	10.50	11.00	10.50	6.75	0	38.75	0	339.06	0	735.00
8/28	0	0	10.50	10.25	10.00	6.50	5.25	40.00	2.50	350.00	32.81	
9/04	0	0	9.75	10.75	9.50	7.75	5.50	40.00	3.25	350.00	42.66	796.25
9/11	0	0	5.50	9.50	11.00	8.00	5.75	39.75	0	347.81	0	
9/18	0	0	11.00	11.00	11.00	7.00	8.00	40.00	8.00	350.00	105.00	833.44
9/25	0	0	9.75	10.00	10.00	8.25	5.50	40.00	3.50	350.00	45.94	
10/02	0	0	9.50	9.00	8.50	8.00	6.00	40.00	1.00	350.00	13.13	844.38
10/09	0	0	10.50	9.75	7.50	8.25	5.50	40.00	1.50	350.00	19.69	
10/16	0	0	11.00	10.25	9.00	8.00	5.75	40.00	4.00	350.00	52.50	
10/23	10.25	0	0	9.75	9.50	6.75	5.50	40.00	1.75	350.00	22.97	820.31
10/30	0	0	11.00	7.00	9.00	8.25	5.75	40.00	1.00	350.00	13.13	
11/06	0	0	11.00	11.00	11.00	6.50	5.00	40.00	4.50	350.00	59.06	774.38
11/13	0	0	VAC	VAC	VAC	VAC	VAC	30.00	0	262.50	0	
11/20	0	0	10.25	10.00	11.25	11.00	5.00	40.00	7.50	350.00	98.44	651.88
11/27	0	0	11.00	11.00	0.00	8.00	8.75	38.75	0	339.06	0	
12/04	0	0	10.50	9.50	8.00	6.75	5.75	40.00	.50	350.00	6.56	846.56
12/11	0	0	9.25	8.50	8.25	7.00	9.00	40.00	2.00	350.00	26.25	
12/18	0	0	10.00	8.50	10.50	8.00	10.50	40.00	7.50	350.00	98.44	791.88
12/25	0	0	10.00	9.50	10.50	9.00	0	39.00	0	341.25	0	

APPENDIX 3

Weeks ending December 26, 2004 through June 4, 2005

Week	Sun.	Mon.	Tues.	Weds.	Thurs.	Fri.	Sat.	Reg. Hours	OT Hours	Reg. Wages Due	OT Wages Due	Wages Paid
1/1	0	0	10.00	9.50	10.50	8.50	0	38.50	0	336.88	0	931.88
1/8	0	0	10.50	8.00	10.50	11.00	11.00	40.00	11.00	350.00	144.38	
1/15	0	0	10.50	10.00	11.00	10.50	11.00	40.00	13.00	350.00	170.63	
1/22	0	0	10.50	9.50	10.00	10.50	11.00	40.00	11.50	350.00	150.94	910.00
1/29	0	0	9.50	10.50	11.00	10.50	11.00	40.00	12.50	350.00	164.06	
2/05	0	0	11.00	10.00	10.50	10.50	5.00	40.00	7.00	350.00	91.88	910.00
2/12	0	0	10.00	10.50	11.00	10.50	11.00	40.00	13.00	350.00	170.63	
2/19	0	6.50	8.50	10.50	10.00	10.50	9.50	40.00	15.50	350.00	203.44	1006.25
2/26	7.25	0	0	11.00	11.00	10.50	11.00	40.00	10.75	350.00	141.09	
3/05	0	0	10.00	9.00	11.00	10.50	11.00	40.00	11.50	350.00	150.94	798.44
3/12	0	0	11.00	8.50	10.50	10.50	11.00	40.00	11.50	350.00	150.94	
3/19	0	0	6.75	7.50	9.00	10.50	11.00	40.00	4.75	350.00	62.34	960.31
3/26	0	0	8.00	7.50	11.00	3.50	11.00	40.00	1.00	350.00	13.13	
4/02	0	0	9.50	6.50	10.50	10.50	11.00	40.00	8.00	350.00	105.00	923.13
4/09	0	0	10.50	10.00	11.00	10.50	11.00	40.00	13.00	350.00	170.63	
4/16	0	0	9.00	8.00	11.00	9.00	11.00	40.00	8.00	350.00	105.00	
4/23	0	0	11.00	7.00	9.00	9.00	8.50	40.00	4.50	350.00	59.06	
4/30	0	0	10.00	8.75	9.00	8.50	8.50	40.00	4.75	350.00	62.34	877.19
5/07	0	0	9.00	11.00	9.00	8.75	8.75	40.00	6.50	350.00	85.31	
5/14	6.50	0	9.50	10.75	11.50	11.00	10.75	40.00	20.00	350.00	262.50	
5/21	0	0	11.00	8.00	11.00	8.50	8.75	40.00	7.25	350.00	95.16	931.88
5/28	0	0	11.00	8.25	8.25	3.50	8.75	39.75	0	347.81		
6/04	0	0	10.00	7.25	7.50	8.25	6.50	39.50	0	345.63		848.75
6/11	0	0	0	0	0	0	0	0	0	0		258.13